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In The

Supreme Court of the United States

October Term, 1988

WISCONSIN DEPARTMENT OF HEALTH AND SOCIAL SERVICES, TAYCHEEDAH CORRECTIONAL INSTITUTION, NONA J. SWITALA, and CERTAIN UNNAMED DEFENDANT EMPLOYEES OF THE WISCONSIN DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Cross-Petitioners,

v.

RAYMOND J. TORRES, FRANKLIN J. UTZ, and GERALD F. SCHMIT,

Cross-Respondents.

On Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

CROSS-RESPONDENTS' BRIEF IN OPPOSITION TO CROSS-PETITION

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Date: February 16, 1989

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QUESTIONS PRESENTED

1. Whether this case is ripe for review.

2. Whether the heavy burden of establishing a bona fide occupational qualification ("BFOQ") defense imposed on an employer seeking to come within the BFOQ exception to Title VII should be relaxed in cases involving BFOQ plans created and implemented by prison administrators to such an extent that the prison administrator's decision to discriminate per a BFOQ is entitled to deference.

3. Whether this Court should review the findings and conclusions of the District Court judge, the panel of the Seventh Circuit, and the Seventh Circuit *en banc*, to the effect that the BFOQ Plan in question was not justified on privacy or security grounds.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTE INVOLVED 1

STATEMENT OF THE CASE:

A. Facts And Background 2

B. Decisions Below 2

REASONS WHY THE CROSS-PETITION SHOULD BE DENIED:

I. THE CROSS-PETITION CANNOT BE GRANTED IF THE INITIAL PETITION IS DENIED 3

II. THE LEGAL ISSUES RAISED IN THIS CASE ARE RIPE FOR REVIEW 3

III. THE *EN BANC* COURT PROPERLY DID NOT DEFER TO THE PRISON ADMINISTRATOR'S DECISION TO DISCRIMINATE PER A BFOQ PLAN BASED ON PRIVACY AND SECURITY GROUNDS 5

A. Under The Applicable BFOQ Burden Of Proof Standard, An Employer Seeking To Come Within Said Exception To Title VII Has A Heavy Burden To Meet 5

B. To Defer To The Decision Of The Employer To Discriminate Under The Guise Of A BFOQ Directly Conflicts With The Applicable BFOQ Burden Of Proof Standards 6

TABLE OF CONTENTS–Continued

Page

IV. THE DISTRICT COURT, PANEL, AND *EN BANC* COURT ALL CORRECTLY HELD THAT THE CROSS-PETITIONERS FAILED TO ESTABLISH THE VALIDITY OF THEIR BFOQ PLAN ON PRIVACY AND/OR SECURITY GROUNDS; ACCORDINGLY, THERE IS NO NEED OR BASIS FOR REVIEWING THE SAME 10

CONCLUSION 12

APPENDIX 1a

TABLE OF AUTHORITIES

Page

CASES:

Anderson v. City of Bessmer City, N.C., 105 S.Ct. 1504 (1985) 10

Andre v. Bendix Corp., 774 F.2d 786 (1985) 10

Dothard v. Rawlinson, 97 S.Ct. 2720 (1977) 5, 7, 8

Fesel v. Masonic Home of Del., Inc., 447 F.Supp. 1346 (Del. 1978), *aff'd* 591 F.2d 1334 (3rd Cir. 1979) 5

Forts v. Ward, 471 F.Supp. 1095 (S.D. N.Y. 1979), *rev'd in part on other grounds*, 621 F.2d 1210 (2nd Cir. 1980) 8

Forts v. Ward, 621 F.2d 1210 (2nd Cir. 1980) 8

Griffen v. Michigan Dept. of Corrections, 654 F.Supp. 690 (E.D. Mich. 1982) 5

Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079 (8th Cir. 1980), *cert. den.* 100 S.Ct. 2942 (1980) 8

Harden v. Dayton Human Rehabilitation Center, 520 F.Supp. 769 (S.D. Ohio 1981), *aff'd* 779 F.2d 50 (6th Cir. 1985) 5, 8

Hardin v. Stynchcomb, 691 F.2d 1364 (11th Cir. 1982) 8

Manley v. Mobile County, Ala., 441 F.Supp. 1351 (S.D. Ala. 1977) 5

Procunier v. Martinez, 94 S.Ct. 1800 (1974) 3

Reynolds v. New York Dept. of Corr. Serv., 568 F.Supp. 747 (S.D. N.Y. 1983) 8

TABLE OF AUTHORITIES–Continued

Page

Torres v. Wis. Dept. Of Health & Social Services, 639 F.Supp. 271 (E.D. Wis. 1986) ..... *passim*

Torres v. Wis. Dept. Of Health & Social Services, 838 F.2d 944 (7th Cir. 1988) ..... *passim*

Torres v. Wis. Dept. Of Health & Social Services, 859 F.2d 1253 (7th Cir. 1988) ..... *passim*

Western Air Lines v. Criswell, 105 S.Ct. 2743 (1985) 7

CONSTITUTIONAL AND STATUTORY PROVISIONS:

F.R.C.P. 52 10

United States Supreme Court Rule 20.5 3

Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. 2000e *et seq* ..... *passim*

H.R. Rep. No. 914, 88 Cong. 1st Session (1963) 6

110 Cong. Rec. 7213 (1964) 6

OPINIONS BELOW

The *en banc* Opinion of the Court of Appeals for the Seventh Circuit is reported at 859 F.2d 1253, and is reprinted in the appendix to the initial Petition for Certiorari filed in *Torres, et al v. Wisconsin DHSS, et al,* Docket No. 88-1046 ("initial Petition"), pp. 1a-36a.

The panel Opinion of the Court of Appeals for the Seventh Circuit is reported at 838 F.2d 944, and is reprinted in the appendix to the initial Petition, pp. 37a-67a.

The Decision and Order of the United States District Court, Eastern District of Wisconsin, the Honorable Robert W. Warren presiding, is reported at 639 F.Supp. 271, and is reprinted in the appendix to the initial Petition, pp. 68a-94a.

JURISDICTION

The Cross-Respondents rely on the statement contained in the initial Petition, pp. 1-2, as well as on the Cross-Petitioners' statement that they were served with said initial Petition on December 22, 1988.

STATUTE INVOLVED

The Cross-Respondents rely on the recitation of the statute involved contained in the initial Petition, p. 2.

STATEMENT OF THE CASE

A. Facts and Background.

The Cross-Respondents rely on the detailed and complete factual recitations contained in the Decision and Order of Judge Warren (appendix to initial Petition ("A"), pp. 69a-81a), and in the panel Opinion of the Seventh Circuit (A, pp. 39a-45a), as well as on the Statement of Facts contained in the initial Petition, pp. 3-6. As such, the Cross-Respondents will not burden this Court with a re-recitation of the facts here.[1]

B. Decisions Below.

The decisions below are all contained in the appendix to the initial Petition, pp. 1a-94a. All that need be said with respect thereto insofar as the Cross-Petition is concerned is that the District Court judge, all three judges on the Seventh Circuit panel, and every judge sitting on the Seventh Circuit *en banc*, all reached the conclusion that the Cross-Petitioners failed to meet their heavy burden of justifying their BFOQ Plan on privacy and security grounds.

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[1] It is the position of the Cross-Respondents that the "Supplemental Statement Of The Case" contained in the Cross-Petition, pp. 2-9, is not entirely accurate and, as expected, is slanted toward the Cross-Petitioners' position. However, the Cross-Respondents will not address this at the certiorari stage of these proceedings, believing first that such issues should be addressed if and when the case is addressed on the merits, and believing second that the trial court record as reflected in the District Court Decision and Order and in the panel Opinion speaks for itself.

REASONS WHY THE CROSS-PETITION SHOULD BE DENIED

I. THE CROSS-PETITION CANNOT BE GRANTED IF THE INITIAL PETITION IS DENIED.

Supreme Court Rule 20.5 provides that no cross-petition which would otherwise be untimely shall be granted unless a timely petition for a writ of certiorari of another party to the case is granted. Inasmuch as the Cross-Petition, in order to be timely in and of itself, would have had to have been filed by January 15, 1989, but was not filed until January 18, 1989, and was not docketed until January 20, 1989, said Cross-Petition would not otherwise be timely and cannot be granted should the initial Petition be denied.

II. THE LEGAL ISSUES RAISED IN THIS CASE ARE RIPE FOR REVIEW.

The Cross-Petitioners contend on page 10 of their Cross-Petition that this case is not ripe for review, and then subsequently argue that the Seventh Circuit *en banc* erred in not applying the prisoners' rights deference standard contained in *Procunier v. Martinez*, 94 S.Ct. 1800 (1974) and successor cases to this Title VII BFOQ case with respect to their privacy and security justifications for the BFOQ Plan.

It is the position of the Cross-Respondents that it is this precise issue, whether a deference standard is to be applied to a prison employer's decision to discriminate per a BFOQ, which makes this case ripe for review. The Seventh Circuit, *en banc*, in its Opinion did not apply the traditional BFOQ burden of proof with respect to the Cross-Petitioners' rehabilitation justification for the

BFOQ Plan, that being to impose a heavy burden on them to justify said Plan as reasonably necessary, but rather deferred to their decision to discriminate, holding that their discrimination based merely on a theory was entitled to substantial weight. As a result of that holding, the *en banc* Opinion is in conflict with case law from other circuits and with Supreme Court precedent, rendering it erroneous.[2]

It is respectfully submitted, then, that the *en banc* Opinion raises legal issues which must be addressed head-on at this juncture, prior to remand. A decision by this Court that the deference standard was improperly applied by the *en banc* court would most certainly result in an affirmance of the District Court's judgment, thus eliminating the necessity for the District Court and the parties to expend time and resources introducing evidence on the rehabilitation issue and redetermining the same. More importantly, the fact that the correctness of the *en banc* Opinion with respect to its new, novel, and unprecedented legal standard is in doubt, and the potential adverse affects should it be allowed to stand insofar as other courts, both state and federal, adopting said erroneous legal standard, dictate that the legal issues be

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[2] As will be discussed later in this Brief, it is the position of the Cross-Respondents that the Seventh Circuit, in its *en banc* Opinion, properly did not defer to the judgment of the Cross-Petitioners to discriminate on the basis of sex on privacy or security grounds. It is also the position of the Cross-Respondents, as will be later addressed in this Brief, that the *en banc* court properly affirmed the District Court's findings and conclusions that the Cross-Petitioners failed to justify their BFOQ Plan on privacy or security grounds.

addressed now. This case is most certainly ripe for review.

III. THE *EN BANC* COURT PROPERLY DID NOT DEFER TO THE PRISON ADMINISTRATOR'S DECISION TO DISCRIMINATE PER A BFOQ PLAN BASED ON PRIVACY AND SECURITY GROUNDS.

A. Under The Applicable BFOQ Burden Of Proof Standard, An Employer Seeking To Come Within Said Exception To Title VII Has A Heavy Burden To Meet.

The BFOQ exception to Title VII provides only the narrowest of exceptions, as is illustrated by the various formulations of said exception by the courts. *Dothard v. Rawlinson*, 97 S.Ct. 2720, 2729 (1977). Although in the mine-run case the burden of establishing a *prima facie* case of sex discrimination rests with the plaintiff in a Title VII action, where, as here, the employer relies on the BFOQ exception to Title VII to justify overt discrimination, a *prima facie* case of sex discrimination is established by that reliance. *Harden v. Dayton Human Rehabilitation Center*, 520 F.Supp. 769, 777 (S.D. Ohio 1981), *aff'd* 779 F.2d 50 (6th Cir. 1985). The burden then shifts to the discriminating employer to establish that its overtly discriminatory employment practices fall within the BFOQ exception which burden, because of the extreme narrowness of the exception, is a very heavy one. *Fesel v. Masonic Home of Del. Inc.*, 447 F.Supp. 1346, 1350 (Del. 1978), *aff'd* 591 F.2d 1334 (3rd Cir. 1979); *Griffen v. Michigan Dept. of Corrections*, 654 F.Supp. 690, 700 (E.D. Mich. 1982). This heavy burden is illustrative of why the BFOQ exception is justified only in rare, appropriate circumstances. *Manley v. Mobile County, Ala.*, 441 F.Supp. 1351, 1357 (S.D. Ala.

1977); 110 Cong. Record 7213 (1964); H.R. Rep. No. 914, 88 Cong. 1st Session (1963).

B. To Defer To The Decision Of The Employer To Discriminate Under The Guise Of A BFOQ Directly Conflicts With The Applicable BFOQ Burden Of Proof Standards.

In Arguments I and III of their Cross-Petition, the Cross-Petitioners refer to their discriminatory employment policy as a "security regulation", and then argue that deference is to be accorded to said discriminatory employment policy per the deference standard contained in the prisoners' rights line of cases.[3] However, the Cross-Petitioners mischaracterize their discriminatory employment policy as a "security regulation"; it was and remains solely an employment policy, and is governed by the strictures of Title VII and the applicable BFOQ exception and standards.[4] Accordingly, the deference standard suggested by the Cross-Petitioners is inapplicable with respect to the discriminatory employment policy (BFOQ Plan) in question, as will next be discussed.

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[3] In footnote 4 on page 16 of the Cross-Petition, the Cross-Petitioners contend that the "security procedures" bear a rational relationship to the legitimate penological goal of promoting security. However, as Judge Easterbrook noted in his dissent, a rational basis is *not* sufficient when an employer, such as the Cross-Petitioners here, seeks to fall within the BFOQ exception - rather, the applicable standard is reasonable necessity. (A, pp. 29a-30a, 35a).

[4] For the Cross-Petitioners to contend that the basis for their discriminatory employment policy was security is contrary to their own policy documentation contained in the

(Continued on following page)

Initially, it is to be noted that the deference principles in question have *never* been applied in a Title VII corrections action. This is illustrated by the fact that the Cross-Petitioners have not cited a single Title VII case in which the deference principles were applied; rather, all of the cases cited by the Cross-Petitioners in support of the deference principle are prisoners' rights cases.

Second, in the only prison-sex BFOQ case to ever be addressed by the United States Supreme Court, *Dothard, supra,* this Court did not defer to the decision of the prison administrator to discriminate per a BFOQ, but rather applied the relevant BFOQ burden of proof standards in reaching its result.[5]

The application of deference principles to a Title VII BFOQ action also directly conflicts with this Court's decision in *Western Airlines v. Criswell,* 105 S.Ct. 2743 (1985). In *Criswell, supra,* this Court held that deference to an employer's choice of job restrictions was at odds with

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record. See Stipulated Exhibit 440, a June 20, 1980, memorandum from Larry Tainter, Chief of the State of Wisconsin Bureau of Personnel and Employment Services, Personnel and Administrative Services, to Elmer Cady, Administrator of the State of Wisconsin Division of Corrections, in which it was stated that the authority to establish BFOQ positions could be based only on the need to protect inmate privacy, and could not be based on security concerns. (Brief Appendix, pp. 1a-4a).

[5] Both Judge Cudahy and Judge Easterbrook noted, in their respective dissents, that the *en banc* court's deference approach cannot be recorded with *Dothard, supra.* (A, pp. 26a, 34a-35a).

Congress' decision in adopting acts such as Title VII and the ADEA to subject such management decisions to a test of objective justification in a court of law. *Id.*, at p. 2754.[6]

Lastly, with the exception of the *en banc* Opinion, every other circuit which has addressed the issue of the appropriateness of a BFOQ for a prison guard position has found that sex was *not* a BFOQ for said position(s). See *Harden, supra; Hardin v. Stynchcomb*, 691 F.2d 1364 (11th Cir. 1982); *Forts v. Ward*, 621 F.2d 1210 (2nd Cir. 1980); *Gunther v. Iowa State Men's Reformatory*, 612 F.2d 1079 (8th Cir. 1980), *cert. den.* 100 S.Ct. 2942 (1980).[7] In fact, it has been generally recognized that in the absence of unusual circumstances such as existed in *Dothard, supra*, federal courts have been unwilling to characterize sex as a BFOQ for the position of correctional officer. See e.g. *Reynolds v. New York Dept. of Corr. Serv.*, 568 F.Supp.

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[6] See the dissent of Judge Easterbrook, A, pp. 34a-35a.

[7] On pages 22-23 of the Cross-Petition, the Cross-Petitioners contend that the courts in *Gunther, supra*, and in *Forts v. Ward*, 471 F.Supp. 1095 (S.D. N.Y. 1979), vacated in part, 621 F.2d 1210 (2nd Cir. 1980), recognized that a BFOQ which protects inmates from opposite-sex touching or observation may enhance the atmosphere in a prison by promoting feelings of dignity and self-worth and minimizing the resentment which accompanies the necessary intrusions. It is critical to note, however, that the court in *Gunther, supra*, upheld a district court decision finding that the employer failed to meet its burden of establishing BFOQs, and that the district court in *Forts, supra*, found that sex was not a BFOQ for the prison guard position. *Id.*, at p. 1099.

747, 749 (S.D. N.Y. 1983).[8] Notwithstanding the above line of cases, the effect of the deference principles contained in the *en banc* Opinion is to say that sex may be a BFOQ for every female prison, and maybe every prison, in America, as stated by Judge Easterbrook in his dissent. (A, p. 31a).

In conclusion, then, for the reasons stated above and stated in the initial Petition, the deference principles in question are not applicable to a Title VII action, and the decision of a prison employer to discriminate under the guise of a BFOQ is not entitled to deference. Obviously, to adopt and utilize such deference principles in a Title VII action would result in the narrow BFOQ exception swallowing the strong Title VII prohibition against sex discrimination. Rather, any employer, including a prison employer, seeking to discriminate per a BFOQ must meet its heavy burden of justifying its discrimination or pay the price of Title VII liability.[9] In this case, the Cross-Petitioners did not meet their heavy burden, as will be addressed in the next argument.

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[8] Note that in the Federal Women's Prison in Alderson there are no "BFOQ" positions which could only be held by female staff. (See Stipulated Exhibit 613).

[9] To require deference to the decision of the employer to discriminate per a BFOQ would, in effect, totally emasculate the "heavy burden" currently imposed on such an employer. Rather than the discriminating employer being required to meet a heavy burden, its decision to discriminate would instead be deferred to in the first instance, shifting the burden to the innocent employee to establish the unlawfulness of the discrimination. This is, obviously, contrary to the currently existing BFOQ standards. See Judge Cudahy's dissent, A, pp. 23a-25a.

IV. THE DISTRICT COURT, PANEL, AND *EN BANC* COURT ALL CORRECTLY HELD THAT THE CROSS-PETITIONERS FAILED TO ESTABLISH THE VALIDITY OF THEIR BFOQ PLAN ON PRIVACY AND/OR SECURITY GROUNDS; ACCORDINGLY, THERE IS NO NEED OR BASIS FOR REVIEWING THE SAME.

An appellate court is bound by F.R.C.P. 52 to accept a district court's findings of fact unless clearly erroneous. This includes the ultimate factual issue in a Title VII action, the finding of intentional discrimination. *Andre v. Bendix Corp.*, 774 F.2d 786, 793 (7th Cir. 1985); *Anderson v. City of Bessmer City, N.C.*, 105 S.Ct. 1504, 1511 (1985). A finding of fact is "clearly erroneous" when, although there is evidence to support it, the reviewing court on the entire evidence before it is left with a definite and firm conviction that a mistake has been committed. *Anderson, supra*, at p. 1511.

In the present case, the District Court judge personally inspected the prison facilities thoroughly on the first day of trial, listened to the testimony of all witnesses over the course of a three week court trial, and received into evidence numerous documents concerning the issues in question. The District Court subsequently issued its Decision and Order, which demonstrated a thorough weighing of all of the evidence, including the credibility of witnesses, a recitation of factual findings, an application of the relevant Title VII and BFOQ law and standards to said factual findings, and the reaching of the ultimate factual conclusion that the TCI BFOQ Plan was not justified on rehabilitation, privacy, or security grounds.

The panel of the Seventh Circuit which heard the appeal affirmed the District Court's judgment on a 2-1

vote, the majority finding that there was no distinct security justification for the BFOQ Plan, that TCI was operated in a way that was very sensitive to the privacy interests of its inmates and afforded them a good deal of privacy from correctional officers of both sexes such that the BFOQ Plan was not justified on a privacy basis, and that the rehabilitation theory also did not justify the BFOQ Plan in question. (A, pp. 49a, 52a, 55a-57a, 59a). Although the dissenting judge, Judge Ripple, disagreed with the majority opinion on the rehabilitation issue, he did not in any way disagree with the majority findings concerning privacy and security. (See A, p. 60a).

The *en banc* court also concurred with the District Court, and the panel, with respect to the issues of privacy and security, holding that the decision of the District Court that the BFOQ Plan could not be justified on a privacy or security basis was correct in law and fact. (A, p. 12a).

It is clear, then, from a review of the opinions of the District Court, the panel, and the *en banc* court that they are completely in accord that the application of the relevant BFOQ principles to the facts of this case dictates finding that the Cross-Petitioners failed to meet their heavy burden of justifying their BFOQ Plan on a privacy or security basis. Inasmuch as the factual basis for said findings is well-established, and further inasmuch as the legal basis for said findings, the application of the relevant BFOQ law and standards to the facts instead of the application of a deference standard, is grounded in well-settled law, there is no legal or factual basis on which this Court should review the *en banc* Opinion with respect to its privacy and security conclusions.

Rather, the only issues before this Court are whether rehabilitation can serve as the basis for the Cross-Petitioners' BFOQ Plan, whether a deference standard is to be applied to a prison employer's decision to discriminate per a BFOQ Plan instead of requiring said employer to meet the traditional BFOQ "heavy burden", and whether a BFOQ can be established on the basis of an employer's opinion or belief, without the need for the introduction of objective evidence.[10] All of the above issues have been addressed in detail in the initial Petition and will not be re-addressed here. Suffice it to say that the Cross-Respondents respectfully urge this Court to grant their initial Petition with respect to said issues, and deny the Cross-Petition for the reasons contained herein.

CONCLUSION

The Cross-Respondents agree with the Cross-Petitioners that this Court should decide the issue of which standard applies to a discriminatory employment policy implemented by a prison employer and denominated "BFOQ" – the deference standard contained in the prisoners' rights line of cases, or the traditional BFOQ standards applied in all prison-sex BFOQ cases to date. In fact, the Cross-Petition is indicative of the confusion which will exist as a result of the *en banc* Opinion when a prison employer, or another employer traditionally

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[10] See footnote 4, *infra*, in which it is indicated that privacy was the only basis on which a BFOQ Plan could be established. Query whether an *ex post facto* justification for the BFOQ Plan such as rehabilitation can serve to validate the same.

deferred to, discriminates per a BFOQ – is that decision deferred to, or does the employer have to meet a heavy burden to justify the discrimination.

The *en banc* Opinion, insofar as it applies the deference standard, is currently in conflict with Supreme Court precedent and all other circuits which have addressed prison-sex BFOQ cases. It has indeed created a "prison exception" to the applicable BFOQ law and standards (A, pp. 26a, 31a, 34a), which exception could easily be extended to other employers to whom deference is typically accorded. (A, pp. 26a-27a). Therefore, the Cross-Respondents' initial Petition should be granted and the *en banc* Opinion reversed as requested therein. However, inasmuch as the *en banc* Opinion was both legally and factually correct with respect to security and privacy as discussed in this Brief, there is no need to review the same and the Cross-Petition should be denied.

In sum, then, the Cross-Respondents respectfully request that their initial Petition be granted, and that the Cross-Petition be denied.

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Date: February 16, 1989

June 20, 1980

To: Elmer Cady, Administrator
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From: Larry Tainter, Chief
Personnel & Administrative Services
Bureau of Personnel & Employment Relations

Subject: Requests from DOC Institutions for Approval of Bona Fide Occupational Qualifications (BFOQ's)

In a recent meeting between representatives of our Bureau, Legal Counsel, and the Bureau of Institutions, at which requests for BFOQ's from DOC institutions were considered, it became apparent that there are significant differences in the way situations involving resident privacy are treated. As a result of our discussions of these differences, it was agreed that no more BFOQ requests should be considered until the issues raised by these differences are addressed. As a result of this agreement, we are returning the requests submitted by Oakhill, Ethan Allen, and Fox Lake, to the Bureau of Institutions for reconsideration in light of the issues discussed below.

Specifically, in considering the request of Ethan Allen School, it appeared that the pattern of BFOQ's requested was significantly different then that approved for Lincoln Hills School, even though these institutions have a similar resident population and have a similar arrangement of living units. Another inconsistency appears in the fact that the Oakhill Correctional Institution has requested BFOQ's for segregation and visiting posts, while the Kettle Moraine Institution has requested none though they

also have visiting and segregation posts, which presumably, function in a similar way. Lastly, the Fox Lake Institution has requested BFOQ's for at least one position in each housing unit, while the Kettle Moraine Institution, which houses residents of the same security level (who presumably are thus subject to a similar degree of supervision) and has similar bathroom/toilet arrangements, has requested no BFOQ's. These disparities, as the Bureau of Institutions representatives agree, are difficult to explain.

The fact that there is a wide disparity among the institutions as to the number and post location of the BFOQ's tends to put requests for extensive use of BFOQ's in a questionable light, and raises the issue of whether alternative methods of job structuring could assure equal employment opportunity as well as protecting resident's rights to privacy. The disparity also would tend to weaken the defense of our utilization of BFOQ's should the issue be brought to the courts, and appears to indicate significant variation among the institutions in dealing with a resident's right to privacy.

An additional problem that has arisen is the relation of BFOQ's to institution security. As you may know, the authority to establish BFOQ's can be based only on the need to protect resident privacy. Thus, BFOQ's are not a vehicle for avoiding the issue of the strength or physical abilities needed to ensure the security of residents. Some institutions appear to feel that perceived security needs can be part of the justification for BFOQ's. Conceptually, however, the sex of the employe, in itself, is only related to the need to ensure privacy, and not to the need for certain physical abilities to be used to maintain security.

When developing requests for BFOQ's, institution personnel should keep this conceptual distinction firmly in mind.

In our request to the Department of Employment Relations for authority to establish BFOQ's, three paradigm cases are discussed: bathroom/shower supervision posts, single coverage posts in living units, and posts in segregation or adjustment units where strip searches or other exposure to unclothed residents is a significant part of the posts' responsibilities. In addition, BFOQ's have been granted for transportation assignments requiring constant supervision of the resident(s) being transported, to ensure that restroom stops can be supervised without violation of resident rights to privacy. Since, presumably, all institutions have posts which involve these functions, though in various ways, it is difficult to understand the diversity of the BFOQ requests. As we agreed with Mr. Kolb and Mr. Stehling, we feel that a Division-wide policy on resident privacy addressing the methods and extent of supervision given to residents in situations in which privacy is an issue, should be formulated and applied before we can consider further requests for BFOQ's.

I would be glad to discuss these issues with you, and to provide assistance to you and your Division to formulate a consistent BFOQ policy. I would also be happy to

discuss these problems with the Institution Superintendent if you feel this would be productive.

LT/mkd

cc: Ken DePrey
Ken Nachreiner
David Whitcomb
Robert Ellsworth
Darrel Kolb
Fred Stehling